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No. 92-6281

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT P. HAGEN,

PETITIONER,

vs.

STATE OF UTAH,

RESPONDENT.

MOTION OF UTE INDIAN TRIBE TO INTERVENE AS A MATTER OF RIGHT

May 5, 1993

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This appeal brings into question the correct boundaries of a portion of the Uintah and Ouray Reservation[1], the area over which the Ute Indian Tribe

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[1] The Uintah and Ouray Reservation is composed of two separate but contiguous tracts of land set aside for the use and occupancy of the Tribe. The Uintah Valley Reservation was established by Executive Order of (continued...)

(hereafter the "Tribe") exercises jurisdictional and governmental authority. The Tribe appeared before this Court, for the first time in this proceeding, as amicus curiae in opposition to the petition for writ of certiorari filed by Robert P. Hagen. This Court granted the writ of certiorari on April 19, 1993. Pursuant to Sup. Ct. R. 21 and Rule 24(a), Fed. R. Civ. P., the Tribe now moves this Court for leave to intervene in the appeal on the following grounds and for the following reasons.

ARGUMENT

This case will determine for all time the exterior boundaries of the Uintah and Ouray Reservation (hereafter the "Reservation"), which is located in northeastern Utah. Because those boundaries define the geographic parameters of the Tribe's governmental authority, the

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[1](...continued)
October 3, 1861, as confirmed by the Act of May 5, 1864, ch. 77, 12 Stat. 63, and the Uncompahgre Reservation was established by Executive Order of January 5, 1882. Only the boundaries of the Uintah Valley portion of the Uintah and Ouray Reservation are at issue in this appeal.

Tribe has an overriding interest in the subject matter of this proceeding. The Tribe cannot, however, fully participate in briefing the issues before the Court or present oral argument on an issue that will finally determine the scope of the its jurisdiction, unless the Court grants this motion to intervene.

Although this Court is not bound to adhere to or enforce the Federal Rules of Civil Procedure for cases brought before it, Rule 24(a), Fed. R. Civ. P., does provide a basis under which the Tribe may intervene in this appeal. In pertinent part, Rule 24(a), reads:

> anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The Tribe clearly meets the requirements of Rule 24(a) and should, therefore, be granted intervention by this Court as a matter of right.

Moreover, granting the Tribe's motion at this stage of the proceeding would not be unprecedented. This Court has not hesitated to allow intervention when extraordinary factors dictate that intervention will serve the interests of justice. See generally United States v. Terminal Railroad Association, 236 U.S. 194, 199 (1915) (parties seeking modification of decree insofar as it operated prejudicially to their rights allowed to intervene, file briefs and present oral argument); National Labor Relations Board v. Acme Industrial Company, 384 U.S. 925 (1966), 385 U.S. 432 (1967) (union allowed to intervene as a party and file brief in support of its interests in labor controversy); Eastern-Central Motor Carriers Association v. United States, 321 U.S. 194, 198-99, n.5 (1944). The extraordinary circumstances presented by this case, wherein the Tribe is unable to fully participate in a proceeding in which its most fundamental interests are at issue, rise to a level that demands that intervention be allowed.

I.

The Tribe is a Real Party in Interest and Possesses an Interest in the Subject of this Proceeding.

Following ten years of litigation, the boundaries of the Reservation were confirmed by the United States Court of Appeals for the Tenth Circuit in 1985. See Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). All parties with an interest in the geographical scope of the Tribe's jurisdiction, including the State of Utah, the Respondent herein, participated in that litigation.[2]

The decision of the Tenth Circuit confirmed that, with two minor exceptions not relevant to this

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[2] The Tribe and the State of Utah were the primary parties in Ute Indian Tribe v. Utah, 521 F.Supp. 1072 (D. Utah 1981), aff'd in part, rev'd in part, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied 479 U.S. 994 (1986). The United States participated in the case as an amicus curiae, supporting the Tribe's argument before the Tenth Circuit that the Uintah Valley Reservation had not been diminished. This Court has now been asked to weigh the decision of the Tenth Circuit in Ute Indian Tribe against a contrary ruling of the Utah Supreme Court. Absent the Court granting the Tribe's intervention request, however, it will have only one of the primary parties to the litigation before it, i.e., the State of Utah.

proceeding, the Uintah Valley portion of the Reservation had not been diminished by its opening to settlement by non-Indians under the Indian Appropriations Act of 1905, Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70. The ruling of the Tenth Circuit recognized that the Tribe's jurisdiction extends to some 4.4 million acres and that the actions of enrolled members of the Tribe, and those of members of other federally recognized Indian tribes, occurring on the Reservation are governed by tribal and federal, as opposed to state law.

Two years after the final ruling of the Tenth Circuit, the State of Utah initiated criminal prosecutions against two individuals, who belatedly asserted they were Indians. State v. Perank, No. 860243, Slip. Op. (Utah July 17, 1992); State v. Hagen, No. 910017, Slip. Op. (Utah July 17, 1992). The prosecutions alleged violations of state law occurring within the boundaries of the Reservation, as those boundaries had been confirmed by the Tenth Circuit. Neither the Tribe nor the United States were parties to the criminal proceedings. Despite the fact

that the Tenth Circuit had previously resolved the Reservation boundary issue, the Utah Supreme Court held that the Uintah Valley Reservation had been diminished by its opening to settlement, finding that the Reservation consists only of those lands held in trust by the United States for the Tribe or individual Indians. The ruling of the Utah Supreme Court has the effect of reducing the size of the Reservation, and correspondingly the area over which the Tribe may exercise jurisdiction, by approximately three million acres.

This appeal is being pursued by a defendant to one of the criminal actions begun by the State of Utah. That individual is not a member of the Tribe, may not be an Indian for criminal jurisdictional purposes[3] and has little,

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[3] Mr. Hagen has been found to possess 5/16ths Indian blood of the Little Shell Band of Chippewa Indians. The Little Shell Band of Chippewa Indians is not a federally recognized Indian tribe, see 51 Fed. Reg. 25,115 (1986), and its members, as a rule, are neither eligible for services from the Bureau of Indian Affairs nor recognized as being "Indian" for purposes of federal criminal statutes, see 25 U.S.C. §§ 450b, 479, 1452(b), 1603 and 1903(3) and (8).

if any, interest in advancing the governmental prerogatives of the Tribe. On the other hand, the Tribe, as the governmental entity with sovereign authority over its territory, is the entity most impacted by any judicial determination enhancing or diminishing the lands over which its authority extends. It is the Tribe, as opposed to the Petitioner, that has a fundamental interest in protecting the integrity of its territorial jurisdiction; in particular when that territorial jurisdiction has been judicially determined by the Tenth Circuit Court of Appeals, see Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985), cert. denied 479 U.S. 994 (1986), and when the Tribe has exercised its jurisdiction and authority without complaint or challenge by the State of Utah or its political subdivisions for the last seven years.

Like other governmental entities, there is no issue of greater importance to the Tribe than preservation of its territorial jurisdiction. Further, the Tribe, because it has judicially established the geographic scope of its territory, has a deep and abiding need to protect its prior judgment

on the continued existence of the Uintah Valley Reservation. Finally, the rights, interests and expectations of the Tribe, its members, members of other federally recognized Indian tribes and non-Indian Reservation residents have been established in reliance on the boundaries of the Uintah Valley Reservation remaining unchanged. The Tribe, and not Mr. Hagen, is responsible for representing those rights, interests and expectations and for ensuring that they are respected and affirmed.

Within the above-described framework, it is evident that the Tribe is the entity with the greatest interest in preserving the Reservation's boundaries as confirmed by the Tenth Circuit in Ute Indian Tribe. While Mr. Hagen is clearly an interested party, the issue before this Court, and Mr. Hagen's sole defense, directly implicates the Tribe and potentially invades its territorial jurisdiction.

Before this Court agreed to hear the petition for certiorari, the Tribe, its members and the United States were not given an opportunity to fully participate in the

state court proceedings of Utah or an opportunity to protect the prior judgment of the Tenth Circuit from collateral attack by the State of Utah. The tactics employed by the State and the lack of concern shown the Tribe by the Utah Supreme Court, especially when coupled with the conclusion that the real adversaries in this appeal should be the State of Utah and the Tribe, demand that the Tribe be allowed to participate in the appeal as a full party.

II.

Disposition of the Proceeding may Impair or Impede the Tribe's Ability to Protect its Interest.

Mr. Hagen seeks a determination that the Uintah Valley portion of the Reservation remains substantially intact, while the State of Utah asserts that the Uintah Valley area of the Reservation has been diminished or disestablished. Were the State of Utah to be successful, the Tribe's legally protected interest in the continued existence of the Reservation would be severely damaged and the rights of its over three thousand members

vitiated.

With regard to the governmental interests of the Tribe, serious consequences would befall the Tribe if this Court were to alter the boundaries of the Reservation. Such a judgment would reduce the Reservation by almost three million acres and deprive the Tribe and the United States of all civil and criminal jurisdiction over the non-trust lands of the Uintah Valley portion of the Reservation.[4] More importantly, because of the "checkerboard" nature of land ownership patterns, a judgment reducing the boundaries of the Reservation would result in a tract-book search to determine both civil and criminal jurisdiction. The Tribe would, therefore, lose the ability to comprehensively plan and regulate the environment and liquor transactions, to enforce hunting and fishing regulations, to regulate business development and to oversee the development of the Reservation as a

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[4] Depending on the severity of the offense, the United States and Indian tribes have exclusive jurisdiction to prosecute Indians for offenses committed in Indian country. See 18 U.S.C. § 1152.

whole. Tribal courts would also lose exclusive jurisdiction to adjudicate the welfare of Ute children who reside on the Reservation but not on trust lands. See 25 U.S.C. § 1911(a) (conferring exclusive jurisdiction on tribal courts to hear child custody proceedings involving Indian children who reside or are domiciled in "Indian country").

The consequences to tribal members, whom the Tribe as the sovereign is obligated to protect, of a diminishment of the Reservation are equally drastic. First, a diminishment of the Reservation would act to disenfranchise tribal members, who, pursuant to tribal law, must reside within the exterior boundaries of the Reservation to vote in tribal elections or to hold tribal elective office. See Article IV, § 1, Constitution of the Ute Indian Tribe of the Uintah and Ouray Reservation. Second, tribal members would, if the Reservation were to be adjudged diminished, be subjected to criminal prosecutions in state court for infractions occurring on non-trust lands of the Reservation. See DeCoteau v. District County Court, 420 U.S. 425 (1975). Third, tribal

members residing on non-trust lands of the Reservation would no longer be able to avail themselves of tribal court jurisdiction to resolve the full range of civil controversies, see Williams v. Lee, 358 U.S. 217 (1959), or domestic relations disputes, see Harris v. Young, 473 N.W.2d 141 (S.D. 1991). Fourth, tribal members not residing, working and locating their property on trust lands of the Reservation would be burdened by a plethora of state taxation statues that at present have no application to them. See Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976); McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973); Bryan v. Itasca County, 426 U.S. 373 (1976).[5]

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[5] As a practical matter, a diminishment of the Reservation would have the effect of creating two distinct classes of tribal members within the historic boundaries of the Reservation, those who live on trust lands and those who do not. Those members who reside on trust lands will continue to be subject to tribal and federal law, may make use of tribal courts and may participate in tribal government. However, those tribal members who now reside on non-trust lands of the Reservation, contrary to the expectations created by and reliance on Ute Indian Tribe, will be forced to surrender their voice in tribal

(continued...)

It is thus clear that it is the Tribe's governing powers and territory and the rights and privileges of its members that are the real issue in this proceeding. The Tribe must, therefore, be allowed to represent its and its members interests in order that it not be impaired or impeded in its efforts and authorities to govern.

III.

The Tribe's Interests are Not Represented by the Parties.

Although whether Mr. Hagen is free from prosecution by the State of Utah for his on-Reservation conduct turns on the continued existence of the Uintah Valley portion of the Reservation, the interests of Mr. Hagen and the Tribe are far from identical. Mr. Hagen desires to be free from incarceration, while the Tribe desires to retain its ability to govern and to protect its members from the encroachment of state law. These interests, albeit interrelated, are not co-extensive.

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[5](...continued)
government and to become persons subject to the jurisdiction of the State of Utah.

Because the Tribe had prevailed in Ute Indian Tribe, it opposed review of the boundaries of the Reservation by this Court, preferring to challenge the State's ability to dispute the boundaries of the Reservation in Federal District Court.[6] It was for this reason, among others, that the Tribe opposed this Court granting Mr. Hagen's petition for a writ of certiorari. In addition, the Ute Tribal Court, on at least one occasion, has ruled that Mr. Hagen is not an Indian for purposes of its criminal code, and that he is subject to prosecution by the State of Utah, regardless of the location of the Reservation's boundaries.[7] A single individual, like Mr.

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[6] Following issuance of the Utah Supreme Court orders in State v. Perank and State v. Hagen, the Tribe filed a renewed motion for injunctive relief in the Federal District Court for Utah. In its motion, the Tribe asked the district court to enjoin the Utah Supreme Court from issuing the remittitur, and thereby entering as final, its decision in State v. Perank, on the ground that the State of Utah was collaterally estopped from challenging the boundaries of the Reservation by the ruling in Ute Indian Tribe.

[7] The Tribe and the United States, as amicus curiae, are the only entities before the Court that have raised this
(continued...)

Hagen, who is not a member of the Tribe and who may not be an Indian for criminal jurisdiction purposes cannot represent the sovereign governmental interests of the Tribe or the interests of its members.[8]

It is the Tribe that can present arguments concerning the pertinent statutes to be reviewed by the Court, that can adequately set the historical framework surrounding the opening of the Reservation and that can

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[7](...continued)
issue. Mr. Hagen will not because if found not to be an Indian, his jurisdictional arguments are defeated. The State of Utah will not question Mr. Hagen's Indian status because the boundaries of the Reservation would no longer be at issue, and its efforts to gain this Court's review of Ute Indian Tribe would be for naught.

[8] The Tribe's concerns regarding the full representation of its interests might be lessened if the United States were a party to this proceeding. The United States, before the Tenth Circuit in Ute Indian Tribe and in its amicus brief to this Court in response to Mr. Hagen's petition, argued that the Uintah Valley Reservation had not been diminished by its opening to settlement. Due, however, to the posture of the appeal and the strategy used by the State of Utah in its prosecutions, the United States, like the Tribe, is not a party to this appeal. The Tribe thus has no alternative but to seek an opportunity to protect its substantial interests through participation in this proceeding as a full party.

focus the Court's attention on the governmental issues underlying this appeal, not Mr. Hagen. It is also the Tribe that can argue the issue of Mr. Hagen's Indian status, a question Mr. Hagen has consistently attempted to avoid. Finally, it is the Tribe alone that will and must represent its sovereign governmental interests and the concerns, needs and rights of its members.

CONCLUSION

The Court should grant the Tribe's motion to intervene because: it is a real party in interest to the controversy; it and its members are those most likely to be impacted by this Court's decision; the interests of the Tribe and of its members are not now represented in the proceeding; and the rights of the Tribe and its members may be impaired or impeded by this Court's decision.

WHEREFORE, the Ute Indian Tribe respectfully requests this Court to enter an order granting the Tribe's motion to intervene and to participate in the briefing of the appeal as a full party aligned with the Petitioner.